Supreme Court of the United States

OCTOBER TERM, 1902.

No. 160.

THE NORTHERN PACIFIC RAILWAY COMPANY, *Plaintiff in Error,*

vs.

ABNER TOWNSEND, MINERVA TOWNSEND, and JOSEPH HOLECEK, *Defendants.*

BRIEF FOR DEFENDANTS

It is admitted by the stipulation of facts (Transcript, pages 10 to 15) that the land in controversy forms a part of the right of way granted to the Northern Pacific Railroad Company by an act of congress. It is also admitted that the defendants made settlement and acquired their title after the act. It is admitted that the United States issued to the defendants a patent of the land in controversy, and that the patent contains in terms no reservation or exception. The contention made by the defendants is that

the action is barred by the statute of limitations. It is conceded by plaintiff that the possession of the defendants is of the character and for the requisite time to consummate such bar, if the Minnesota statute of limitations applies to this plaintiff and the land in controversy. The plaintiff only denies the applicability of the Minnesota statute of limitations to an unused portion of the railroad right of way.

The plaintiff is not a federal but a Wisconsin corporation. If this court has jurisdiction, it is because the record presents a federal question. The question presented involves the construction of the Minnesota statute of limitations rather than the construction of an act of congress. Before this case was commenced, the supreme court of Minnesota held that the statute in question is merely a statute of repose and does not "indulge in the presumption of a grant" (*Dean v. Goddard*, 55 Minn., 290), and this doctrine is affirmed in the case at bar. (Transcript, p. 31). The legislature of Minnesota has the exclusive power to fix the time within which an action of ejectment may be maintained. It cannot be contended that the statute (fifteen years) violates any guaranty of the constitution. The construction of that statute by the state supreme court is final. We submit that there is, in fact, no federal question in this case, and that this court is bound by the construction put upon the

Minnesota statute of limitations by the supreme court of that state.

It is contended by plaintiff that it has no power to grant, or otherwise alienate any part of this four hundred feet strip, even though such part is useless for railroad purposes. It argues that this right of way is a thing sacred; that it constitutes a kind of Chinese wall extending from Lake Superior to Puget Sound, in which the state, the county, the city, the public, the individual can obtain no interest through grant or abandonment by the railway company or by long exclusive possession, or in any other manner. This right of way extends not only through fertile fields, but over mountain ranges and along the banks of many streams and rivers. It extends through the heart of great cities. If the contention of the plaintiff is correct, the public can never acquire the right to maintain a road or a street across it even with its consent; though the plaintiff should abandon some part of it, changing its line many miles to the north or to the south, acquiring its new right of way by purchase or condemnation, the old right of way must remain barren and unused. Upon their theory, in case of such abandonment, even the grantee of the government of the land subject to the right of way, could not take possession thereof or acquire any title therein.

The right of way granted by the act in ques-

tion is not different in character from the rights of way granted to other railroads by other special acts, or by the general act of 1875 (18 Stat., 482). The language is the same in substance. Nor is it different from a right of way obtained under the law of eminent domain. It will be observed that section 7 of the act in question gives the railroad company the power to obtain rights of way by condemnation proceedings. Likewise do statutes in each of the states. The object and purpose of all of these statutes are the same.

In *Northern Pacific Railway Company v. City of Spokane*, 64 Fed., 508, the Circuit Court of Appeals for the Ninth Circuit, construing this act, said:

> "The nature of the right of way through the public lands, which the railroad obtained by the grant, was no different from that which it had acquired from private lands by purchase or by condemnation proceedings under the laws of the several states through which it passed."

The question raised by plaintiff here was passed upon in that case. The railroad had platted an addition to the original townsite to Spokane Falls, called Railroad Addition, and had platted into lots not only land lying beyond the limits of its right of way, but also all of its right of way, except a strip two hundred and

twenty-five feet in width, in the centre of which lay its tracks, and had dedicated many streets across the right of way. Many years later it attempted to close one of these streets by constructing a freight station on the right of way in the centre of the dedicated street. This street had, in fact, never been graded or used. The city objected. The railroad company contended that it had the right to locate a freight station anywhere it deemed wise on its right of way, and that it did not have the power to divest itself of this use of its right of way or of this right by grant or otherwise. The Court of Appeals held the dedication to be valid, and that the railroad company could not locate its freight station on that part of its right of way. An appeal was taken by the company to this court, but was thereafter dismissed upon the motion of its counsel.

Not only did the predecessor of plaintiff, more than twenty years ago, dedicate streets across its right of way in the heart of the city of Spokane, but it also sold and conveyed lots and blocks carved out of this right of way to many different parties, who have erected thereon hotels, warehouses, and other permanent structures.

Northern Pac. Ry. Co. v. Ely, 25 Wash., 386.

In the case at bar, the supreme court of Minnesota in discussing this question, among other things, said:

"Let us look at the judgment from which the defendants have appealed from a practical standpoint, and see what it means if the contention of plaintiff's counsel be sustained. The right of way granted under the act of June 2, 1864, was east and west across and through this state, from Lake Superior to the Red River of the North, over the public domain. Although part of the territory to be traversed had been disposed of by the federal government prior to the passage of the act, the grant came very near being a strip of land four hundred feet wide for about two hundred and fifty miles. If plaintiff's claim be upheld, they should have stretching across the state from east to west a strip of territory four hundred feet wide, upon which no person could travel without committing a trespass; over which no railroad company could obtain a right to lay its rails, and across which no public highway could be established, except by consent of plaintiff. If counsel should be sustained, the public could not obtain the right by proceedings under the statutes, or even by prescription to a public way for ordinary travel, and municipal authorities would have to enter into private negotiations with plaintiff in order to secure the privilege of a highway crossing this strip. And so would corporations, organized for public purposes and equipped with the right of eminent domain. Any and all of these proceedings would be as inimical to the rule which coun-

> sel assert in this case, and quite as open to the objections now relied upon, as is the application of the statute of limitations as to adverse possession to the facts now before us. It would be preposterous to announce a rule of law which would uphold and permit such a result." (Transcript, p. 31.)

This quotation understates plaintiff's position. It contends not only that the rights mentioned cannot be acquired without its consent, but also that it has no power to consent.

The question raised by plaintiff has been considered by many courts in this country, and also in England and in Canada, and there is but one authority supporting its position. That is *Southern Pac. Co. v. Hyatt*, 132 Cal., 240. The reasoning of that court is that a railroad right of way is a public highway; that by the decisions of California, no part of a public highway can be lost by adverse possession, *ergo*, no part of a railroad right of way can be thus lost. There is no suggestion in the opinion that the court considered or had knowledge of the numerous well considered cases *contra*. A railroad is certainly not a public highway in the sense that it belongs to the people; but the public are trespassers if they go on the railroad right of way without the consent of the railroad, except when in a lawful street or way. The minor premise, that real property belonging to the public cannot be lost

by adverse possession is not in accordance with the weight of authority in this country, and has never been the law in Minnesota.

> *St. Paul v. Railroad Co.*, 45 Minn., 387.
> *Railroad Co. v. Minneapolis*, 45 Minn., 400.
> *Wayzate v. Railroad Co.*, 50 Minn., 438.
> *Transcript*, p. 30.

The supreme court of Indiana recently passed upon this question in *Pittsburg C. C. & St. Ry. Co. v. Stickley*, 155 Ind., 312; 58 N. E. Rep., 192. That court said:

> "Appellant finally insists that land acquired by a railway company for right of way or station purposes cannot be taken from it by adverse possession, because a railroad is a public highway, and because the statute forbids interference with the company's exclusive use. *A railway company owes certain duties to the public, but it holds and uses its property for the profit of its stockholders.* The cases holding that the statute of limitations affords no defence to actions for encroachment upon streets and roads are inapplicable. A railroad is not a public highway in the sense that it belongs to the people. *Railroad officers are not governmental agents whose laches creates no bar.* It is true that, for reasons of public policy, a judgment creditor will not be permitted to destroy a railroad by cutting it into parcels on execution sales, if the company resists.

Farmers' Loan & Trust Co. v. Canada & St. L. Ry. Co., 127 Ind., 250; 26 N. E., 784; 11 L. R. A., 740. If a company voluntarily disables itself to perform its duties to the public, its charter may be forfeited. *But there is no reason why a railway company should not be permitted to dispose of land it does not need in fulfilling its public duties, or why, if it disposes of land it does need, it should not be compelled if it wishes to avoid a forfeiture of its charter, to reacquire the land by purchase or condemnation.* It is true that the statute entitled a railway company to take land in fee, and forbids interference with the company's exclusive use. But the right to the exclusive use (which is an incident to every unqualified ownership) must be asserted. If one occupies adversely for twenty years land owned by a railway company, *the statute of limitations should raise the presumption of a grant, for the company holds its lands for private gain, as a private proprietor.* The state confers the power of eminent domain to enable railway companies to perform efficiently their duties as common carriers. *But it is not apparent why the state should be concerned in preventing investors in railway stocks from sustaining loss through the negligence of their agents.*" (Italics are ours.)

The supreme court of Illinois has held in several cases that a railroad company may lose part of its right of way by adverse possession.

Railroad v. Houghton, 126 Ill., 233.
Railroad v. O'Connor, 154 Ill., 550.
Railroad v. Moore, 160 Ill., 9.
Donohue v. Railroad Co., 165 Ill., 640.
Railroad Co. v. Wakefield, 173 Ill., 564.

In the Houghton case the court said:

"But it is insisted that the plaintiff's right of way, being a mere easement,—the fee running in Walker and his grantees, subject to the easement,—the possession of Walker and his grantees is to be regarded as being held under their title, and therefore not hostile to the plaintiff, so as to constitute it an adverse possession. To this view we are unable to yield our assent. If the right of way of a railroad company were an easement, the proper enjoyment of which was consistent with the possession and occupancy of the land by the owner of the fee, such possession and occupancy might be regarded as a mere exercise by the owner of the servient estate of his property rights, subject and in subordination to the easement. Such, however, is not the character of the easement which a railroad company acquires in the land covered by its right of way. As said in *Hazen v. Railroad Co.*, 2 Gray, 574; 'The right acquired by the corporation, though technically an easement, yet requires for its enjoyment a use of the land permanent in its nature, and practically exclusive.' The same view was taken by the supreme

court of Vermont in *Hurd v. Railroad Co.*, 25 Vt., 116, where, in discussing the interest obtained by a railroad company in its right of way by condemnation, the court said :— 'If that interest is regarded as a mere servitude or easement, the land nevertheless becomes so far the property of the corporation that their right is exclusive in its use and possession during its existence, as much so as that of the owner or occupant of the adjoining land. Those from whom the land was taken retain no right to its use or occupation for pasturage or otherwise. The object for which it is appropriated and used is wholly inconsistent with such right on the part of the former owner, as well as with that security to themselves and safety to the public which is necessary to enable the corporation to enjoy the franchises granted by their charter.' In *Jackson v. Railroad Co.*, *Id.*, 150, the same court, speaking through Mr. Chief Justice Redfield, says :—'The railway company must, from the very nature of their operations, in order to the security of their passengers and workmen, and the enjoyment of the road, have the right at all times to the exclusive occupancy of the land taken, and to exclude all concurrent occupancy by the former owners in any mode, and for any purpose.' *Railroad Co. v. Potter*, 42 Vt., 256; *Railway Co. v. Allen*, 22 Kan., 285. In *Railroad Co. v. Godfrey*, 71 Ill., 500, this court held that the right of way was the exclusive property of the rail-

road company, upon which no unauthorized person had a right to be for any purpose; and in the opinion of this court in *Railroad Co. v. Patchen*, 16 Ill., 198, it is said:—'I presume the right to the land upon which railroads are built is not strictly analagous to the easement of the public in highways, leaving the fee in the owner of the soil, but is an absolute ownership in fee for railroad purposes.' While we are not disposed to hold that the deed from Walker to the plaintiff conveyed to the plaintiff an estate in fee in the right of way, it is clear that in conveying an estate which, so far as the right of possession for railroad purposes is concerned, had most of the qualities of the fee. The right of possession thereby conveyed was exclusive, and was wholly inconsistent with the subsequent possession of the land or any part of it by the grantor or his assigns for the purpose of grazing or agriculture, or as a part of the farm to which it originally belonged. The possession of Walker and his assigns, being wholly inconsistent with the plaintiff's title, and having been held under a claim of title on their part, has been hostile, and has constituted an adverse possession; and, such possession having been continued for more than 20 years, the plaintiff's right to bring its action for the recovery of said lands is barred by the statute. The finding of the court was therefore in accordance with the evidence, and the judgment must be affirmed."

In the Moore case the right of way was obtained through legislative grant.

That a third party may obtain title to a strip of railroad right of way by adverse possession is sustained by the following additional authorities:

Matthews v. Lake Shore & M. S. Ry. Co., 110 Mich., 170.

Turner v. Fritchburg R. R. Co., 145 Mass., 143.

Gay v. Boston A. R. Co., 141 Mass., 407.

Paxton v. Yazoo & M. V. R. R. Co., 76 Miss., 536.

Spottswood v. Morris & E. R. Co., 61 N. J. Law, 322.

Northern Pacific Ry. v. Ely, 25 Wash., 384.

Bobbitt v. Ry. Co., 9 Q. B. Div., 424.

Norton v. Ry. Co., 13 Ch. Div., 268.

Railway Co. v. Rosseau, 17 Ont. App., 483.

It is true that the defense of adverse possession was held insufficient under the facts in the cases cited by plaintiff at the bottom of page 11 of its brief, but the decisions in those cases were not based on the principle advocated here by the railroad company, but on the principle that the railroad right of way is an ordinary easement, and that both the owner of the fee and the railroad may be in possession, and that the possession of the owner of the fee was not adverse, but permissive.

The principle enunciated in those cases is not only contrary to the weight of state authority, but is repudiated by plaintiff in the case at bar, and the contrary thereof was held by this court in *New Mexico v. Trust Co.*, 172 U. S., 171. In that case this court, discussing a railroad right of way under a congressional grant like the one at bar, said:

> "But if it may not be insisted that the fee was granted, surely more than an ordinary easement was granted—one having the attributes of the fee, perpetuity and *exclusive* use and possession; also the remedies of the fee and like it corporeal, not incorporeal property."

It is admitted by plaintiff that defendants' possession is in fact adverse and not permissive, and that the plaintiff can not recover if it has the power to grant or alienate in any manner any unused part of its right of way. (Brief, p. 2.)

Abandonment of part of a right of way, the remainder being still used, will not extinguish the entire right of way, but only so much of it as has been abandoned.

> *Latimer v. Livermore*, 72 N. Y., 174.
> *Louisville etc. R. R. Co. v. Covington* (Ky.), 2 Bush., 526.

If a grant is to be presumed by adverse possession, the plaintiff would be in the same position

as if it had given a deed of the property to defendants and was seeking to set it aside and for possession, upon the ground that the deed was *ultra vires*. This it could not do. It was said by this court in an action brought to set aside a conveyance of a railroad for the term of 999 years, that:

> "When the parties are in *pari delicto* and the contract has been fully executed on the part of the plaintiff by the conveyance of the property, or by the payment of money, and has not been repudiated by the defendant, it is now equally well settled that neither a court of law nor a court of equity will assist the plaintiff to recover back the property conveyed or money paid under the contract."

St. Louis V. & T. H. R. Co. v. Terre Haute & I. R. Co., 145 U. S., 393.

Plaintiff cites *Thomas v. Railroad Company*, 101 U. S., 71. That is an action upon an unexecuted part of a lease given by the railroad company of its entire property. The court held that the lease was void as against public policy, and an action upon an unexecuted part thereof could not be maintained. The court recognized the principle in that case thereafter more fully enunciated in *St. Louis R. R. Co. v Terre Haute*, 145 U. S., 393, cited above, saying:

> "We cannot see that the present case comes within the principle that requires that contracts, which though invalid for want of corporate power, have been fully executed, shall remain as the foundation of rights acquired by the transaction."

It is settled by the authorities cited above, and the cases referred to therein, that if a railroad company should grant its whole property, or a part thereof, in contravention of its charter provision, or of statute or public policy, that if the grant were executed, the railroad company could not rescind the same or regain possession of the property upon the ground that its act was *ultra vires*. It is clear that the deeds given by the Northern Pacific Railroad Company, the predecessor of the plaintiff, of parts of its right of way referred to in the opinion of the court in *Northern Pacific Railway Co. v. Ely*, 25 Wash., 386, cannot be adjudged void at the instance of the railroad, and that the railroad cannot regain possession of the land because of the invalidity of the grant. It is admitted by plaintiff in its brief that if the railroad company could not regain possession of a part of its right of way that it had previously conveyed, that likewise it cannot regain possession of a part of its right of way held adversely by third parties for the statutory period. In its brief, page 4, it is said:

> "If the premises in question might be granted or otherwise alienated by the railway company, we concede that limitation laws may operate upon them * * * We regard the test question as being whether the railway company is capable under the terms of the act of congress of conveying or estopping itself from claiming the right of way granted by that act, or any part thereof."

If it would be in violation of its powers for the plaintiff to alienate or abandon any part of its right of way, no matter how small or useless, the validity of its acts can be questioned only by the government.

National Bank v. Matthews, 98 U. S., 621.
American Emigrant Company v. Adams County, 100 U. S., 61.
Fritts v Palmer, 132 U. S., 232.

It is insisted by plaintiff that this right of way is a fee title, citing *New Mexico v. United States Trust Co.*, 172 U. S., 171. That case only decides that the right of way is not an ordinary easement because the railroad has the right of exclusive possession, citing various state authorities holding that such right of way is an easement with the added right of exclusive possession. Such is also the holding of the state authorities cited *supra*.

We think the question is not very material in the case at bar because whether the railroad company's interest is that of an easement or a qualified fee does not affect the question of adverse possession. In either case it may lose that interest by adverse possession. We think, however, it was the intention of congress to grant that which is usually meant by the words "right of way," that the railroad company acquired an easement only with the right of exclusive possession, and that the grantees from the government under the preemption and homestead acts of the various quarter sections through which the railroad runs, without reservation of the railroad right of way in the patents, acquired the fee simple title to the land, subject to the railroad easement. It is impossible to believe that congress ever intended that if the right of way of the railroad company should be abandoned through any quarter section of land, and the railroad company should take up a right of way at some other point, as in the Smith case, that the four hundred feet strip constituting the original right of way became the property of the government and might be granted by it to third parties under the provisions of any of the various acts of congress providing for the acquisition of public lands. The fact is that a contrary interpretation has been placed upon these acts by the various departments of the government from the begin-

ning, because the settler has not only obtained patents in all instances without mention of this right of way, but has also paid the government for the entire acreage included within his settlement without such reservation.

Plaintiff relies upon *Northern Pacific Railroad Company v. Smith*, 171 U. S., 260. In that case there was no question of adverse possession of any part of the right of way. On the contrary, the court said:

> "The lots in question are within two hundred feet of the main track of this railroad as actually constructed and have been occupied by the defendant (railroad company) during the entire period since the construction of the road, excepting lots 11 and 12, which during about three years were in the adverse possession of Browning & Wringrose and of Patrick R. Smith, the defendant in error, as the tenant of said firm."

As to the two lots referred to, the railroad company brought an action in ejectment in 1877, and recovered possession of the same. There is no question in this case which was involved in the Smith case. It is true that the court said in that case:

> "The finding of the trial court that only twenty-five feet in width has ever been occupied for railroad purposes is immaterial. By granting a right of way four hundred feet

in width, congress must be understood to have conclusively determined that a strip of that width was necessary for public work of such importance, and it was not competent for a court, *at the suit of a private party*, to adjudge that only twenty-five feet thereof was occupied for railroad purposes, in face of the grant, and of the finding that the entire land in dispute was within two hundred feet of the track of the railroad as actually constructed, *and that the railroad was in actual possession thereof by its tenants.*" (Italics are ours.)

While the above quotation is dictum, we think we have a right to assume, considering the facts of that case, that all this court intended to say is that in a suit brought by a private individual for the possession of a part of this right of way, that he cannot raise the question as to whether or not a part of the right of way is useless, when the railroad is in the actual possession of the whole thereof; that the conclusive determination of the grant is only against the individual who desires to prevent the road from obtaining possession of the right of way in the beginning, but that it is not a determination against the railroad that it may not by act or deed abandon or release any part of its right of way.

The question suggested in the opinion in above case is not in issue in the case at bar. It was not alleged by the plaintiff that the small strip

of farming land in controversy was necessary or even useful to the plaintiff, nor was it alleged by the defendants that it was useless to or not needed by the railroad. This is not the "suit of a private party," but an action by the railroad to recover possession of certain land of which it has been out of possession for over fifteen years.

Plaintiff cites *Gue v. Tidewater Canal Company*, and *East Alabama Railway Co. v. Doe*. These cases hold that a railroad property cannot be dismembered by a creditor upon execution sales. The principle involved is no different than that decided by this court in *Muller v. Dows*, 94 U. S., 444, in which it was held that in a mortgage foreclosure suit of a railroad property, it was against public policy for the railroad to be sold in fragments, but that the entire property should be sold, although a part thereof did not lie in the state where the action was commenced. The doctrine of that case has been followed in railroad mortgage foreclosures.

Low v. Blackwell, 87 Fed., 400.
Central Trust Co. v. Wabash, 29 Fed., 620.

We believe that to be the general doctrine in the state courts and that there is no decision *contra* in the courts which have held that an unused strip of a right of way may be lost by adverse possession or abandonment.

The supreme court of Illinois recognized this

doctrine in *Craft v. Indianapolis D. & W. Railroad Co.*, 166 Ill., 580, in which case the court said, among other things, after citing the case of *Muller v. Dows*, and quoting from the opinion of that case :

> "The law of this case has since been frequently recognized and followed by the same court. The decisions of the courts of Pennsylvania, New York, Connecticut, Indiana and other states are to the same effect.
>
> "The doctrine is reasonable and just to all parties interested in such mortgages. * * * We think the decree of the superior court of Marion county has the same effect upon the mortgaged property west of the state line as it had upon that east of it."

The supreme court of Indiana, in *Farmers' Loan & Trust Company v. Canada & St. L. R. R. Co.*, 127 Ind., 250, held that a part of a railroad could not be sold under a mechanics' lien judgment. That court said :

> "The public has a right to have a railroad remain an entirety and it would be destructive to public interest to permit it to be broken up into disjointed and practically useless fragments. Sound policy and due regard for public welfare, as well as for the rights of individuals, require that a railroad shall be treated as an entirety, both as to the mode of acquiring a lien and as to the mode of its enforcement."

This principle was not overlooked by that court when it held that a part of the railroad right of way might be lost by adverse possession.

> *Pittsburg C. C. & St. L. R. R. Co. v. Stickley*, 155 Ind., 312.

The opinion in the latter case referred to the former case, saying:

> "It is true that, for reasons of public policy, a judgment creditor will not be permitted to destroy a railroad by cutting it into parcels on execution sales if the company resists. *Farmers' Loan and Trust Co. v. Canada & St. L. R. R. Co.*, 127 Ind., 250. If a company voluntarily disables itself to perform its duties to the public, its charter may be forfeited. But there is no reason why a railroad company should not be permitted to dispose of land it does not need in fulfilling its public duties, or why, if it disposes of land it does need, it should not be compelled, if it wishes to avoid a forfeiture of its charter, to reacquire the land by purchase or condemnation * * * If one occupies adversely for twenty years land owned by a railway company, the statute of limitations should raise the presumption of a grant, for the company holds its land for private gain, as a private proprietor. The state confers the power of eminent domain to enable railway companies to perform efficiently their duties as common carriers. But it is not apparent why the state should be

concerned in preventing investors in railway stock from sustaining loss through the negligence of their agents."

The case of *Grand Trunk Railroad Company v. Richardson*, 91 U. S., 454, and *Hartford Insurance Company v. Chicago, M. & St. P. R. R. Co.*, 175 U. S., 91, are both cases brought for the negligent destruction by fire of buildings upon the right of way. In the Grand Trunk case, the structures were a saw mill, boarding house and lumber yard. The court held that the railroad company had the right to permit them to be on the right of way. In the Hartford Insurance Company case, the railroad company had given a lease of a part of its right of way for a warehouse. The court held that the lease was valid and that the railroad company would have to respond in damages for the negligent destruction of the property. The court said:

"A railroad corporation holds its station grounds, railroad tracks, and right of way for the public use for which it is incorporated, *yet as its private property* and to be occupied by itself or by others in the manner which *it may consider* best fitted to promote, or not to interfere with the public use."

* * * * * * * * * * * * * * *

"In the case at bar, no one had the right to put a warehouse or other building upon the land of the railroad corporation without *its*

consent and the corporation was under no obligation to the public or to the partnership to permit the latter to do so." (Italics are ours.)

It seems clear that the railroad corporation has the right to grant to another possession of any part of its right of way, at least that part which it does not occupy with railroad tracks, station or other structures, and that whether or not it shall do so shall be determined, not by the government, but by the corporation itself; also whether such grant shall be for one year, ten years, or in perpetuity, rests in the discretion of the railroad officers, and that the corporation cannot set aside any of its grants or contracts upon the theory that the government might object. The railroad corporation makes its contracts as a private proprietor, and its contracts are as sacred as those of the humblest corporation or individual. If the corporation, at some time in the future, should conclude that it desires possession of the property it has granted to others, it cannot come into court and rescind its contract at its own volition, but must like any other corporation or person purchase the property, which because of its quasi public character it has been given the power to do by the statutes of the various states and by acts of congress, even against the will of the other party.

Under the rule contended for by plaintiff, it can, at any time, repudiate the many deeds and leases that it has given of parts of its right of way which it has not desired to use and upon which thousands of innocent people have expended their means in permanent improvements. This rule would work a serious hardship not only on these parties but on the general public and the railroads as well. It is well known that thousands of permanent structures have been erected by mercantile houses upon the rights of way of the railroads of the country, and that for the economical transaction of business it is necessary that this should be done. Some of these grants are in perpetuity and some long time leases. No business concern could afford to erect such structures under a mere license, or under a contract which would not be for such length of time as to be practically a grant of the fee and exclusive possession, nor would it be possible for such mercantile houses to erect any permanent structure if the grant or contract could be, at any time, repudiated or set aside because of disagreements over freight rates, or at the mere whim or caprice of the officers of the railroad. The business of the country would be seriously hampered. The railroads, the shippers and the general public would suffer.

Under the rule we contend for, supported by the English and state authorities, no harm can

be done the government, the public, the railroad corporation, or its grantees.

This, however, is not merely a question of whether the railroad had the right to convey a useless part of its right of way or whether in a suit brought by the railroad the question of want of power can be used by it to repudiate its contracts, but it is also a question of whether this railway company, a Wisconsin corporation, is bound by the statute and laws of the state of Minnesota as to its property within that state.

We submit that there is merit in the statement of the supreme court (Transcript, p. 31):

> "No matter what rights the beneficiary of the grant may have to use and occupy, if it chooses, its right of way over and through the public domain to the full extent of four hundred feet, it is obvious that it must take this right subject to the statute relating to adverse possession. No other conclusion can be tolerated."

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For Defendants.